IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6556 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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BHARTIYA KARAMCHARI SANGH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 6556 of 1989

MR HB SHAH for Petitioner No. 1

MR HD DAVE ASST GOVT PLEADER for Respondent No. 1

MR KM PATEL for Respondent No. 2

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 02/04/2002

ORAL JUDGEMENT

#. Heard learned advocate Mr.P.C.Master on behalf of Mr.H.B.Shah for petitioner and Mr.K.M.Patel, learned advocate for respondent No.2, so also Mr.H.D.Dave, learned AGP for respondent No.1.

#. In the present petition, RULE has been issued by this Court on 12th September, 1989. By way of this petition, the petitioner has challenged the order passed by the Labour Commissioner dated 24th May, 1989, wherein the dispute which was raised by the petitioner Union has been decided not to refer for adjudication on the ground that there was no system or practice to pay subsistence allowance to Badali Worker and salary to the Badali Worker for the days on which the workmen have not worked. Therefore, the labour commissioner has come to the conclusion that demand which has been raised by the petitioner Union is not reasonable and therefore, it is not required to be referred for adjudication.

#. Learned advocate Mr.P.C.Master for petitioner Union has submitted that decision which has been challenged by the petitioner wherein while exercising the powers under Section 10 read with Section 12[5] of the Act, the Labour Commissioner has decided the merits of the matter whether Badali Worker is entitled to subsistence allowance and salary of the days on which they have not permitted to work. But on the question of merits, the labour commissioner is not entitled to take any decision on merits but it is jurisdiction of the Tribunal to examine the merits of the matter and the dispute. However, he relied on decision of the Apex Court in case of Telco Convoy Drivers Mazdoor Sangh and Another Vs. State of Bihar and others reported in AIR 1989 SC 1565.

#. Learned advocate Mr.K.M.Patel for respondent No.2 has submitted that even otherwise also, the Badali Worker is not entitled to any benefit for the days on which he has not worked with the respondent No.2. It is further submitted that there was no system even no provision nor any standing order under the law which entitles the Badali Worker to have subsistence allowance for days on which he was not permitted to work. Therefore, the demand itself is unjustified and unreasonable and the same cannot be referred for adjudication. Mr.Patel has mainly relied on observations of the Apex Court made in para-15 of the decision reported in AIR 1986 SC 1514. However, Mr.Patel submits that the labour commissioner can consider the prima facie dispute and in the instant case, this is only prima facie observations and as such, there is no decision on merits.

#. I have considered submissions of the learned advocates for the parties. The dispute which has been raised by the petitioner Union claiming better condition of service. The dispute cannot be based upon existing

service condition or existing law because the tribunal is having power even to create new condition of the service or to impose new condition or to incorporate new condition for service of the workman. Therefore, even tribunal has powers to change conditions of service and grant some better benefits even beyond statutory provisions made under the statute. Therefore, on this background, the petitioner Union has demanded to have subsistence allowance as well as salary on the day on which the workmen are not permitted to work and therefore, the demand can be said to be demand of better condition of service with a view to maintain family of the Badali Workers when they have not received any work from the respondent No.2. Therefore, decision which has been relied on by learned advocate Mr.Patel is not applicable to the facts of this case. The observations made by the Apex Court in reported decision AIR 1989 SC 1565 relied by learned advocate Mr.Master in para-11, 12 and 13 are referred as under :-

"11. It is true that in considering the question of making a It is true that in considering the question of making a reference under section 10(1), the Government is entitled to form an opinion as to whether an industrial dispute "exists or is apprehended", as urged by Mr. Shanti Bhusan. The formation of opinion as to whether an industrial dispute "exists or is apprehended" is not the same thing as to adjudicate the dispute itself on its merits. In the instant case, as already stated, the dispute is as to whether the convoy drivers are employees or workmen of TELCO, that is to say, whether there is relationship of employer and employees between TELCO and the convoy drivers. In considering the question whether a refer, should be made or not, the Deputy Labour Commissioner and/or the Government have held that the convoy drivers are not workmen and, accordingly, no reference can be made. Thus, the dispute has been decided by the Government which is undoubtedly, not permissible.

12. It is, however, submitted on behalf of TELCO that unless there is relationship of employer and employees or, in other words, unless those who are raising the disputes are workmen, there cannot be any existence of industrial dispute within the meaning of the term as defined in section 2(k) of the Act. It is urged that in order to form an opinion as to whether an

> industrial dispute exists or is apprehended, one of the factors that has to be considered by the Government is whether the persons who are raising the disputes are workmen or not within the meaning of the definition as contained in section 2(k) of the Act.
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> 13. Attractive though the contention is, we regret, we are unable to accept the same. It is now well settled that, while exercising power under section 10(1) of the Act, the function of the appropriate Government is an administrative function and not a judicial or quasijudicial function, and that in performing this administrative function the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by section 10 of the Act. See Ram Avtar Sharma v. State of Haryana, [1985] 3 SCR 686; M.P. Irrigation Kararnchari Sangh v. The State of M.P., [1985] 2 SCR 1019 and Shambhu Nath Goyal v. Bank of Baroda, Jullundur, [1978] 2 SCR 793."

#. In view of above observations made by the Apex Court in Telco Case and considering the facts of the present case, according to my opinion, the order of labour commissioner concerned while deciding the dispute raised by the petitioner Union that Badali Worker is not entitled to subsistence allowance as there is no system or practice or even they are not entitled to any salary for days on which they are not permitted to work, it amounts to decision on merits, seems to have passed on examination of merits which is contrary to the provisions of Section 10 of the I.D.Act and obviously without jurisdiction and therefore, the same requires to be quashed and set aside by this Court.

#. Accordingly, present petition is allowed. The order passed by the Labour Commissioner concerned dated 24th May, 1989 is hereby quashed and set aside with direction to the Labour Commissioner concerned to reconsider the matter in light of the Apex Court decision reported in AIR 1989 SC 1565 and to pass appropriate orders in accordance with law within period of two months from the date of receiving the copy of this order.

Rule is made absolute accordingly. No order as to costs. Direct Service is permitted to respondent.

Date : 2-4-2002 [H.K.Rathod, J]

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